witnesses that they had consented to the third accused signing their names on the relevant bank documents, these documents are no longer "false documents" so that both charges against him must fail.

We need only refer to one of the authorities cited by Mr. Chelliah to support his contention, *Kenneth Frank Vincent* v. *Reg.*[6] The accused in that case, who was *inter alia* charged with the offence of forgery (the English law in respect of this offence being substantially the same as ours), had bought a van from a certain firm, and had himself signed the order form for the van, addressed to the firm, in the name of his brother Keith Vincent, with his brother's consent.

In delivering the judgment of the court, Roskill L.J. said, at page 290:

"As I have already said, the first question this court has to consider is: was this a false document? Quite plainly, in the view of each member of this court, it was not a false document in that there was nothing in it that was false. The starting-point of the offence of forgery under the statute must be found in the language of the statute itself. Section 1 defines forgery as the making of a false document in order that it may be used as genuine. That, of course, is in subsection (1). Subsection (2) goes on: 'A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making.' Pausing there for one moment, one has only, as this court thinks, to read those words to see how the Crown failed to begin to prove that this document was a forgery because it was a document, as I have already emphasized, which was authorised by the person on whose behalf it was made. The appellant signed Keith's name and did it with Keith's authority. Therefore, in the view of this court, this document, however dishonest the purpose for which it was brought into existence, was not a false document within section 1(2) of the Forgery Act 1913."

The learned trial judge's remark about the implied misrepresentation by the third accused might be a relevant ingredient to the offence of cheating, and indeed the learned Deputy suggested if we understand him aright that this court could under section 60 of the Courts of Judicature Act amend the charges to charges of cheating, and presumably, on the evidence convict him on the amended charges.

We do not think we should do so, or indeed exercise our powers under that section in any other way, and would accordingly allow the cross-appeal by the 3rd accused and quash the conviction and sentence imposed on him on the two counts of forgery.

Order accordingly.

Solicitors: *Jagjit Singh & Co.; Ng Ek Teong & Partners; R.R. Chelliah & Bros.; Lawrence & Joseph.*

MALAYAN COMMERCIAL BANKS ASSOCIATION v. NATIONAL UNION OF BANK EMPLOYEES

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 23 & May 7, 1981]

[Kuala Lumpur Federal Court Civil Appeal No. 16 of 1979]

Administrative Law — Certiorari — Application to quash award of Industrial Court — Industrial Court had not acted in excess of jurisdiction.

Industrial Law — Retiring benefits — Award of Industrial Court — Not made in excess of jurisdiction — Certiorari does not lie.

In this case the parties had reached agreement on all terms except on retirement benefits. The Minister referred the matter to the Industrial Court which was asked to determine the formula for computation and quantum of retirement benefits payable to employees within the scope of the collective agreement. After hearing the parties the Industrial Court considered that the computation formula and quantum as provided in the previous collective agreement should stand and made an award accordingly. On application to the High Court the learned Judicial Commissioner quashed the award and issued an order of *certiorari*. The appellant appealed.

Held: the Industrial Court had not acted in excess of jurisdiction in this case and the order of *certiorari* must be set aside and the award of the Industrial Court restored.

Cases referred to:-

(1) *The Queen* v. *Marsham* [1892] 1 Q.B. 371.
(2) *Re Arundel Justices, Ex parte Jackson* [1959] 2 All E.R. 407.
(3) *R.* v. *Surrey Quarter Sessions* [1962] 1 All E.R. 825.
(4) *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165; [1980] 2 All E.R. 689.
(5) *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)* [1975] 2 M.L.J. 175.
(6) *In re Racal Communications Ltd.* [1980] 2 All E.R. 634, 640.
(7) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(8) *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56.
(9) *Malayan Pineapple Co. Sdn. Bhd.* v. *Food Industry Employees Union* [1976] 2 M.L.J. 23, 24.
(10) *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

Sri Ram for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned Judicial Commissioner in granting an order of *certiorari* and quashing the award of the Industrial Court.

Briefly, the facts are as follows. In 1960 the respondent and a Committee of the Banks entered into an agreement on retirement benefits for the Bank employees. At that time appellant was not formed yet. The formula and quantum of retirement benefits under the agreement were based on 77½% of last drawn salary multiplied by the number of years of service less any sum paid in excess of the statutory contribution to the Employees' Provident Fund ("E.P.F."). In 1966 a dispute arose between the appellant and the respondent concerning the scope of

Union representation and retirement benefits. Pursuant to Regulation 5 of the Essential (Trade Disputes in the Essential Services) Regulations, 1965, the Minister for Labour referred the dispute to a Mediation Panel headed by the late Justice H.S. Ong. The Mediation Panel submitted a report which was subsequently embodied in an agreement dated May 1, 1967. The 1967 agreement expired on November 25, 1970 but the parties agreed to continue to follow the terms of the Mediation Panel Report when they signed the 1971 collective agreement on October 1, 1971. The Report recommended a two-tier system of calculating retirement benefits, that is, on the basis of 77½% of last drawn salary multiplied by the number of years of service up to December 31, 1965 and 9¾% of yearly salary as from January 1, 1966. On the expiry of the 1971 collective agreement the parties negotiated for a new collective agreement. They reached agreement on all terms except on retirement benefits. They signed the 1975 collective agreement but agreed jointly to refer the issue of retirement benefits to the Industrial Court. Subsequently, the Minister of Labour and Manpower referred the matter to the Industrial Court under section 23(1) of the Industrial Relations Act, 1967. The Industrial Court was asked to determine the formula for computation and quantum of retirement benefits payable to employees within the scope of the 1975 collective agreement which benefits were omitted from the agreement pending an award by the court. After hearing the parties the Industrial Court considered that the computation formula and quantum as provided by the 1971 collective agreement should stand and made an award accordingly. On appeal the learned Judicial Commissioner quashed the award and issued an order of *certiorari*. Appellant appealed.

It is the submission of Mr. Peddie for appellant that there are three issues, namely, (a) formula for computation of retirement benefits, (b) quantum of retirement benefits, and (c) contribution to "E.P.F." It was not in dispute that the third issue was abandoned at the hearing before the learned Judicial Commissioner. But for some reason the learned Judicial Commissioner seemed to have forgotten about it as he granted *certiorari* on this issue.

The next submission of Mr. Peddie is that in applying for *certiorari* respondent relied on grounds set out in a statement (Page 6 of Appeal Record). Every ground refers to an error of law. None of the grounds refers to excess or lack of jurisdiction. Paragraph 3(b)(1) of the statement speaks about "failing to exercise jurisdiction vested in it by law." Paragraph 3(b)(4) refers to there being "no law in existence for the court to even consider the quantum and accordingly the court is not in a position to make an award on this." Therefore, it is the contention of Mr. Sri Ram for respondent that the Industrial Court misconstrued the scope of its powers by disclaiming competence to adjudicate. Paragraph 3(b)(5) refers to the reluctance of the Industrial Court to go into the merits and demerits of the Mediation Panel Report thus declining jurisdiction and refusing to adjudicate the very trade dispute referred to it by the said Committee.

Where a magistrate ought to hear evidence relating to a particular inquiry but refused to do so he may be said to have declined jurisdiction as to the whole inquiry and in such a case the proper remedy would be *mandamus*: see *The Queen* v. *Marsham*.[1] Appellant said respondent applied for *certiorari* only. *Mandamus* was not sought for. Where there is refusal to exercise jurisdiction the proper remedy to ask for is *mandamus*.

Mr. Sri Ram contended that the grounds referred to by appellant all disclose errors of law going to jurisdiction. He asked this court to look at the law on the matters. He said that although we might not agree with the reasoning of the learned Judicial Commissioner in granting *certiorari* yet we might agree that he was right in granting *certiorari*.

In his judgment at page 77 of the Appeal Record the learned Judicial Commissioner states: —

> "The issue before the Industrial Court is to determine the formula for computation and quantum of retirement benefits payable to employees within the scope of the Collective Agreement dated 31st December, 1975 which benefits were omitted from the Agreement pending an award by the court."

The issue was clear whether there should be a change of the formula and the quantum. However, the learned Judicial Commissioner really dealt with the question of quantum only. He gave reasons for dealing with the question of quantum but said nothing as to why the Industrial Court was wrong on the matter of formula. The Industrial Court dealt with the various matters raised before it in great detail and gave reasons for its decision on each matter. However, Mr. Sri Ram said the only issue before the Industrial Court was concerned with retirement benefits.

Having referred to the two-tier system and the appellant's undertaking to make good any difference that any employee might suffer, it is not surprising that the Industrial Court should remark that it could not see how it would work to the detriment of the employees. At page 60 of the Appeal Record there is this passage: —

> "It may be that parties are at liberty to negotiate for better terms and conditions of service when collective agreements and awards expire. But here, the Union is asking the court to change a system which has been in existence for over seven years and which had been accepted by both parties. As shown above, there has been no monetary loss to any employee. The Court is reluctant to go into the merits or demerits of the Report and thinks it is a little late in the day to say that the Union's Executive Council had in fact rejected to Report."

We do not read this as suggesting that the Industrial Court was declining jurisdiction.

The learned Judicial Commissioner referred to a passage in the judgment of the Industrial Court which reads: —

> "On the question as to whether the 9.75% itself can be increased, the court would like to point out that the former section 60H of the Employment Ordinance, 1955 dealing with retirement benefits has since been repealed. The Minister of Labour and Manpower is now empowered by law to prescribe the quantum of retirement benefit. To this effect, regulations are being drawn up and until such time as they come into force, there is no law in existence for the court to even consider the quantum. Accordingly, the court is not in a position to make an award on this. In any event, the Union is always entitled to substitute the quantum provided for by the proposed law if it is more favourable than the existing one."

He disagreed with the finding of the Industrial Court merely because he considered it had misconstrued the meaning of section 6OH. He thought the Industrial Court was not prevented from making an award in respect of the retirement benefits subject to the power of the said Minister to make regulations. Rightly or wrongly the Industrial Court has made a decision. So long as it decided the issue within its jurisdiction the High Court could not interfere save in the case of excess of jurisdiction.

The Industrial Court referred to various collective agreements and the manner the retirement benefits were calculated. It then stated at page 61 of the Appeal Record as follows: —

"After considering the above, the court has come to the conclusion that the computation formula and quantum as provided for in the 1971 Agreement shall stand."

The Industrial Court has jurisdiction to decide as above. It merely decided that there should be no change but to await the making of the regulations by the said Minister. It cannot be said that in deciding as it did it was declining jurisdiction. Even if it was so, as the appellant submitted earlier on, the proper remedy was *mandamus* which was never applied for by respondent.

The only matter on which the learned Judicial Commissioner considered the Industrial Court to be wrong was stated earlier on. There is not a word in the judgment of the learned Judicial Commissioner to say that the Industrial Court had acted in excess of jurisdiction. He should look at the whole award as the Industrial Court gave detailed reasoning. It is not always possible for a court or tribunal to make an award which will completely satisfy both parties to a dispute.

Appellant submitted that if the learned Judicial Commissioner thought that the Industrial Court was wrong on one part, i.e. the quantum, then he should quash that part only. He need not have to quash the whole decision if the issue of formula was not wrong. He cited in support the case of *Re Arundel Justices, Ex parte Jackson*[2] where it was held that there was no need to quash the whole conviction and sentence because the justices has exceeded their jurisdiction in regard to an order of disqualification. Only the order of disqualification need be quashed. This was followed in *R.* v. *Surrey Quarter Sessions.*[3]

The Judicial Commissioner heard the appeal before the decision of the Privy Council in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*[4] In the light of that case we do not think the learned Judicial Commissioner was right to grant the respondent's application for an order of *certiorari* on ground of error of law which did not affect jurisdiction. In that case the Privy Council reviewed the various local authorities and came to the conclusion that the decisions do not amount to a line of authority establishing that *certiorari* is available to quash an award of the Industrial Court for a mere error of law on the face of the record. As regards *Mak Sik Kwong* v. *Minister of Home Affairs, Malaysia (No. 2)*[5] the Privy Council was of the view that the learned judge distinguished correctly between errors of law that give rise to excess or lack of jurisdiction which would justify the court in issuing an order of *certiorari.* In *Re Racal Communications Ltd.*[6] the Director of Public Prosecutions applied to a judge under section 441(1) of the Companies Act, 1948 for an order to inspect the books and papers of the Racal Communications Ltd. — ("Racal"). Vinelott J. who heard the application refused to make the order sought. The Director appealed. On the hearing of the appeal the question arose whether the Director had a right to appeal since section 441(3) stated that the decision of a judge on an application under section 441 shall not be appealable. In allowing the appeal the Court of Appeal held that the judge had mistakenly refused jurisdiction as a result of misconstruing the 1948 Act and accordingly had made an error of law going to jurisdiction, which gave rise to a right of appeal notwithstanding the exclusionary words of section 441(3) of that Act. Consequently, the Court of Appeal made an order authorising a named person to inspect the books and papers of "Racal". The House of Lords reversed the decision of the Court of Appeal in so far as it relates to the jurisdiction of that court.

At page 640 Lord Diplock made certain observations which precisely cover the position which the Industrial Court took. He said: —

"My Lords, to describe Vinelott J's decision to dismiss the Director of Public Prosecution's application under section 441(1) as a refusal or renunciation of jurisdiction seems to me to involve a misuse of the word 'jurisdiction.' His jurisdiction was to decide whether on the material placed before him the application should be granted or refused. In deciding that it should be refused, he was exercising his jurisdiction just as much as if he had decided that it should be granted."

In *Racal's* case[6] the House of Lords also took the opportunity to explain the problems created by the case of *Anisminic Ltd.* v. *Foreign Compensation Commission*[7] and *Pearlman* v. *Keepers and Governors of Harrow School.*[8] Having dealt with the two cases Lord Edmund Davies referred to Lord Denning's judgment in *Pearlman's* case[8] and also to the dissenting judgment of Geoffrey Lane L.J. as he then was, at page 644: —

"'The judge is considering the words... which he ought to consider. He is not embarking on some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion on a difficult question. It seems to me that, if this judge is acting outside jurisdiction, so then is every judge who comes to a wrong decision on a point of law. Accordingly, I take the view that no form of *certiorari* is available to the tenant.'

My Lords, like the Judicial Committee of the Privy Council in a recent decision to which I was a party (*South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union*[4]) I have to say respectfully that the existing law is in my judgment, to be found in the dissenting judgment of Geoffrey Lane L.J. in *Pearlman's* case[8] and that the majority view was erroneous.

Turning to the present case I hold that the effect of section 441(3) could not be clearer in depriving the Court of Appeal of jurisdiction."

The Industrial Court may have taken an easy way out of a difficult situation. But it has made a decision. It has not declined jurisdiction in the issue submitted to it for determination. If it has made any error of law it has been made within jurisdiction. There is nothing to suggest that it has done anything or acted is excess of its jurisdiction.

When the reference was made to the Industrial Court on June 1, 1976 section 60H of the Employment Ordinance, 1955 was still subsisting. It was repealed on January 1, 1977. The Industrial Court made its award on March 28, 1977. By that time section 60H had been repealed. There was a vacuum. Although the Industrial Court did not say so in so many words it would seem that it did not consider itself the appropriate forum to fill that vacuum. The proper authority at the time was the said Minister who could do so by virtue of his power to make regulations. Moreover, the Industrial Court did not decline jurisdiction on the question of formula. Respondent cited *Malayan Pineapple Co. Sdn. Bhd.* v. *Food Industry Employees Union*[9] where the Industrial Court considered the provisions of section 60G of the Employment Ordinance, 1955 and came to the conclusion that all claimants were entitled to retrenchment benefits except those who had been in continuous service with the company for less than three years. Respondent submitted that the wordings of section 60G were almost the same as section 60H and therefore the same principle should apply to retirement benefits. In that case the contention was that the award was wrong in law on the ground that the Industrial Court had no power under section 60G to award retrenchment benefits. In the present case the contention is just the reverse as the Industrial Court had the power under section 60H but did not use it when it ought to use it.

Further, respondent submitted that if the Industrial Court could not rely on section 60H then there was a trade dispute before it. This would give it jurisdiction to make an award on retirement benefits. By virtue of the meaning of "trade dispute" as defined in section 2 of the Industrial Relations Act it would be wide enough to include retirement benefit: see *National Association of Local Government Officers* v. *Bolton Corporation.*[10] Respondent stressed that there was nothing to prevent the Industrial Court from deciding on retirement benefits. It was contended that the retirement benefits should be increased.

There is a fundamental flaw in respondent's argument that the retirement benefits should be increased. The Industrial Court was entitled to say it would leave the matter as it was. If the Industrial Court was wrong regarding the effect of section 6OH it was merely an error of law within its jurisdiction to so decide as stated in *Fire Bricks'* case.[4] The main point is that the Industrial Court has not acted in excess of jurisdiction to warrant the issuance of *certiorari*. The decision of the learned Judicial Commissioner cannot be supported.

For reasons given we would allow the appeal with costs and set aside the order of the learned Judicial Commissioner. We would restore the award of the Industrial Court. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Skrine & Co.; Sri Ram, Chan & Chia.*

KOTA KINABALU INDUSTRIES SDN. BHD. v. DIRECTOR GENERAL OF INLAND REVENUE

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 26 & May 7, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 127 of 1980]

Revenue Law — Income Tax — Sale of properties by limited company — Whether gains or profits from business or realization of investment — Finding of fact by Special Commissioners — Appeal — Income Tax Act, 1967, s. 4.

The appellant company was incorporated to have the members of a family in one company and to build houses on vacant properties to let out for rent. The appellant held a number of properties and some of these were sold for profit. The appellant was assessed to tax in respect of the sale of (a) a vacant lot bought for the construction of a factory/godown but sold when it was found unsuitable for the purpose; (b) and (c) two lots of rubber lands and (d) a shop-lot.

The Special Commissioners held that the gain or realization from the sale of the vacant lot was a realisation of a part of its investment and therefore not liable to tax. They considered the sales of the other three items were adventures in the nature of trade and therefore the profits were liable to tax. On appeal, the appeal was dismissed by the High Court. The appellants appealed.

Held: (1) the Special Commissioners were entitled to find on the evidence that the appellant had engaged in a trade of dealing with land;

(2) the power of the High Court to hear appeals from the Special Commissioners is to review the decision of the Commissioners on points of law being bound by the facts which they have found provided always there is evidence on which they came to such conclusions of facts;

(3) in this case the learned Judge found no ground to interfere with the decision of the Special Commissioners and the appeal should be dismissed.

Cases referred to:-

(1) *C.I.R.* v. *Fraser* 24 T.C. 498, 501.
(2) *Lewis Emanuel and Son Ltd.* v. *White* 42 T.C. 369, 377.
(3) *Edwards* v. *Bairstow* 36 T.C. 207, 224.
(4) *American Leaf Blending Sdn. Bhd.* v. *Director-General of Inland Revenue* [1979] 1 M.L.J. 1; [1978] 3 All E.R. 1185.
(5) *International Investment Ltd.* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.
(6) *J.P. Harrison (Watford) Ltd.* v. *Griffiths* (1962) 40 T.C. 281, 303.
(7) *Rellim Ltd.* v. *Vise* 32 T.C. 254.
(8) *Taylor* v. *Good* 49 T.C. 277.
(9) *Murray* v. *C.I.R.* 32 T.C. 238.
(10) *Brace-Girdle* v. *Oxley* [1947] 1 K.B. 349, 358.
(11) *C.I.R.* v. *Reinhold* 34 T.C. 389.
(12) *Balgownie Land Trust Ltd.* v. *C.I.R.* 14 T.C. 684, 691.
(13) *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (1928) 41 C.L.R. 148.
(14) *Hudson's Bay* v. *Stevens* (1909) 5 T.C. 424; 101 L.T. 96 (C.A.).
(15) *Tebrau (Johore) Rubber Syndicate* v. *Farmer* (1910) 5 T.C. 658.
(16) *C.H. Rand* v. *Alberni Land Co.* (1920) 7 T.C. 629.
(17) *Alabama Coal etc. Co.* v. *Mylam* (1926) 11 T.C. 232.

HIGH COURT.

S. Woodhull for the appellant.

Zulkefli bin Ahmad Makinuddin (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: In this appeal the appellant is dissatisfied with the finding of the Special Commis-